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IFCI LTD v. BISHOPGATE CAPITAL LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG J
[CIVIL SUIT NO: WA-22NCC-705-12-2019]
5 APRIL 2023

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Abstract – *Since the object of the present applications to amend statement of defence was to add better particulars to complaints that had already been pleaded so as to allow the issues between the parties to be clarified and resolved equitably, the applications were held to be bona fide, would not cause prejudice not compensable by costs to the other party and would not change the character of the present suit into a suit with another and inconsistent character.*

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CIVIL PROCEDURE: *Pleadings – Amendment of statement of defence – Applications to add better particulars pertaining to criminal investigations and allegation of fraud to already pleaded complaints – Whether applications bona fide – Whether there was inordinate and unexplained delay in filing of applications – Whether applications tactical manoeuvre or afterthought to improve defence – Whether amendments would change character of suit to suit of another or inconsistent character – Whether amendments would cause prejudice not compensable by costs – Rules of Court 2012, O. 20 r. 5(1) & O. 92 r. 4*

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The plaintiff had granted Gouttephone Technology Private Ltd ('GTPL') a short-term loan amounting to INR552,400,000. In return for the loan, as security, GTPL assigned all its rights and benefits in a promissory note ('PN') in the value of USD10 million to the plaintiff. Pursuant to the PN, the first defendant promised to pay the plaintiff the USD10 million on the maturity date of the PN. At the same time, the PN was also insured by the second defendant under a credit default risk insurance policy ('AIL policy'). Under the AIL policy, the second defendant agreed to indemnify the plaintiff against losses arising from any default of the PN. Subsequently, GTPL defaulted on the loan. Despite a redemption process being initiated and a claim being lodged against the first and second defendants respectively, for recovery of losses, both defendants failed to make any payment to the plaintiff. Instead, an amicable settlement agreement was entered between the parties. Through the amicable settlement agreement, the second defendant stated that it would pay the plaintiff two separate payments in the amount of INR6,250,000 ('first payment') and INR618,750,000 on or before the agreed dates. However, the second defendant only paid the plaintiff the first payment. Aggrieved, the plaintiff commenced the present action to claim for: (i) the balance settlement sum of INR618,750,000 from the defendants jointly and severally; or (ii) as an alternative, the sum of INR572,457,085, being the amount of insurance claim under the AIL policy, from the second

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defendant ('present action'). The current case pertained to applications by the defendants to amend paras. 11 and 21 of their respective defence, under O. 20 r. 5(1) and O. 92 r. 4 of the Rules of Court 2012 ('ROC'), made at the time the trial was still ongoing, when the plaintiff's witness, PW2, was in the midst of giving her evidence ('amendment applications'). *Via* the amendment applications, the defendants sought to add better particulars or related facts arising from a criminal investigation conducted by the Criminal Investigations Bureau, New Delhi ('CIB') against the plaintiff, for allegation of fraud relating to the short-term loan the plaintiff granted to GTPL ('CIB criminal investigations'). The amendment applications were met with objections from the plaintiff. The plaintiff, among others, had raised the following issues: (i) there were inordinate and unexplained delays in the filing of the applications, because: (a) it was filed midway through the trial of the present action; and (b) no cogent reasons were given for the delay; the defendants' alleged difficulties to obtain the relevant information or documents in relation to the CIB investigations were not justifiable. The first information report ('FIR') containing the relevant details of the investigation had already been made available to the defendants prior to the beginning of the trial of the present action. Therefore, the defendants should had filed the amendment applications containing the better particulars at the earliest opportunity or before the commencement of the trial of the present action. This was especially when the plaintiff had constantly objected to these particulars sought to be added on the ground both paras. 11 and 21 of the defendants' defence lacked particulars and specifics of fraud; (ii) the amendment applications were not *bona fide*, a tactical manoeuvre and an afterthought as they were an attempt by the defendants to improve their defence after having the benefit of the plaintiff's objections; and (iii) if the amendment applications were to be allowed, the character of the present action would change into that of a different or an inconsistent character, from a straightforward recovery action to a potential fraud case.

Held (allowing applications with costs):

(1) In considering an application to amend a pleading under O. 20 of the ROC, three basic questions must be considered: (i) whether the application was *bona fide*; (ii) whether the prejudice caused to the other side could be compensated by costs; and (iii) whether the amendments would not in effect turn the present suit from one character into a suit of another or inconsistent character. Further, by the use of the word 'and', if the applicant failed on the first ground, he would fail the application altogether. (paras 20 & 21)

(2) When the FIR was referred to PW1 during cross-examination, PW1 had given answers and confirmations that were not just indicative of the admitted existence of the CIB criminal investigations, but also of the accuracy and/or (probable) veracity of some of the allegations made in

A the FIR against the plaintiff. However, the plaintiff's counsel objected to PW1's cross-examination. The same happened to PW2's cross-examination, after she was examined on the same matter. The plaintiff contended that paras. 11 and 21 of the defendants' defence did not allude to particulars of the alleged fraud. The amendment applications were
B filed because the defendants did not want to deal with the plaintiff's recurring objections. The defendants' explanation on the need of the amendment applications were truthful and candid. (paras 22 & 23)

(3) The application of *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* ('*Hong Leong Finance*') could be distinguished. In that case, (i) the
C application to amend was made four days before trial; (ii) such application was made to introduce two new and distinct defences; (iii) there was a span of 13 years between the close of the pleadings and the application to amend; and (iv) the trial of the case had not commenced despite 13 years had lapsed after the close of the pleadings.
D Whereas, in the instant case, (i) the age of the case was only 2.5 years old; (ii) there was no new and distinct defence introduced; and (iii) the allegation of fraud against the plaintiff had already been pleaded in the defendants' defence. As such, the pronouncement in *Hong Leong Finance* on delay could not extend to all 'delays'. Each case must be decided on
E its own facts. Therefore, in this case, the amendment applications were filed not too late. (paras 24-26)

(4) The amendments served to give more particulars to the complaints regarding the CIB criminal investigations and the allegation of fraud against the plaintiff. They sought to amplify the defence and aimed to
F set out greater clarity and/or enable the real questions and/or the true issues in controversy between the parties to be resolved and/or decided fairly and equitably. Since there was also the fact that the plaintiff, at all material times, already had the knowledge and was aware of the complaints in the defendants' defence, the plaintiff's objections of
G tactical manoeuvre or afterthought was held to be of no teeth. (paras 29 & 30)

(5) The plaintiff would not be confronted with a new case to answer or 'be compelled to meet a case radically different from the one it was first called upon to meet' if the amendments were allowed. The object of the
H amendments was only to show more clearly the defendants' complaints regarding the CIB criminal investigations and the allegation of fraud against the plaintiff, which had already been pleaded in their defence. The ground that the amendment applications, if allowed, would change the character of the present action into a different or inconsistent
I character, therefore, does not resonate. (paras 34 & 39)

(6) Bearing in mind that the amendments sought would not introduce anything inconsistent with the original pleading, and that the stage of the case was still at the plaintiff's case, no real prejudice would be caused to the plaintiff if the amendment applications were allowed. This was because, if deemed fit, the plaintiff could still call witnesses and tender other documents to rebut the allegations particularised in the amendments. Whereas, for the defendants, they would face a far greater injustice if the amendments were not allowed. Thus, a finding that the plaintiff, due to the amendment applications, would suffer a prejudice that could not be compensated by costs, could not be made. The amendment applications were therefore allowed, with costs subject to allocator be paid to the plaintiff. (paras 42, 45 & 46)

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA ***(refd)***

Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal [2011] 5 CLJ 720 CA ***(refd)***

Ban Seng Leong Sdn Bhd & Ors v. Kong Kon Fah & Ors [1999] 2 CLJ 170 HC ***(refd)***

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 HC ***(refd)***

Charlesworth v. Relay Roads Ltd [2000] 1 WLR 230 ***(refd)***

Chaw Anui v. Tan Kim Chai [2002] 5 CLJ 79 HC ***(refd)***

China Orient Asset Management Corporation v. Alexma Corporation Sdn Bhd [2017] 1 LNS 1558 CA ***(refd)***

Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party) [2016] 4 CLJ 831 CA ***(refd)***

Cropper v. Smith (1884) 26 Ch D 700 ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2010] 8 CLJ 1 CA ***(refd)***

Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors [2010] 7 CLJ 931 CA ***(refd)***

E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal [2018] 7 CLJ 685 CA ***(refd)***

ESP Energy Sdn Bhd v. KB Enviro Sdn Bhd [2017] 1 LNS 2073 HC ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(dist)***

HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***

Jupiter Securities Sdn Bhd v. Wan Yaakub Abd Rahman [2002] 3 MLJ 264 ***(refd)***

Ketteman & Ors v. Hansel Properties Ltd & Ors [1987] 1 AC 189 ***(refd)***

Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor [2003] 2 CLJ 58 HC ***(refd)***

Ribuwajar Development Sdn Bhd v. Ratus Mayang Sdn Bhd [2002] 6 CLJ 56 HC ***(refd)***

Skrine & Co v. Mbf Capital Bhd & Anor And Other Appeals [1998] 3 CLJ 432 CA ***(refd)***

Suhaili Ismail v. Syarikat Sribima Sdn Bhd [2015] 1 LNS 719 CA ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors [2014] 2 CLJ 445 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18 r. 12(1), O. 20 rr. 5(1), (5), 8, O. 92 (4)

For the plaintiff - Vijay Raj Balasupramaniam, Ratha Govindasamy, Tan Li Gang & Ng Kar Man; M/s Skrine
For the 1st defendant - Yeow Tze Yi; M/s Yeow Yap & Co
For the 2nd defendant - Trevor De Silva, Frankie Tan, Chia Wilson & Kingsley Woon Wai King; M/s K H Wong, Chin & Cheah

Reported by Syamim Ariffin

JUDGMENT

Liza Chan Sow Keng J:

Introduction

[1] There are two applications before the court in encl. 139 and encl. 141 filed by the first and second defendants respectively to amend paras. 11 and 21 of their respective defence. Both applications filed pursuant to O. 20 r. 5(1) and/or O. 92(4) of the Rules of Court 2012 ("ROC 2012") raised identical amendments. As the issues are the same regarding the identical amendments, both applications were heard together.

[2] I had allowed both applications, with costs to the plaintiff on 7 February 2023 and given broad reasons for my decision. This judgment contains the full reasons for my decisions.

Background Facts

[3] The plaintiff granted a short-term loan of INR552,400,000 ("the loan") to Gouttephone Technology Private Limited ("GTPL"). GTPL assigned all its rights and benefits under a Promissory Note ("PN") in the value of USD10,000,000 to the plaintiff as security for the loan.

[4] Pursuant to the PN, the first defendant promised *inter alia* to pay the holder of the PN the sum of USD10,000,000 on the maturity date of the PN, which was on 19 November 2018.

[5] The PN is underwritten/insured by the second defendant pursuant to a credit default risk insurance policy dated 20 November 2017 issued by the second defendant ("AIL Policy"). The AIL Policy *inter alia* provided that the second defendant agreed to indemnify the plaintiff against losses arising from any default of the PN.

[6] GTPL defaulted on the loan. On 18 October 2018, the plaintiff issued a notice for event of default to GTPL. GTPL failed to remedy the default and requested that the plaintiff to redeem the PN.

[7] On 10 November 2018, the plaintiff carried out the process for redemption of the PN. The first defendant failed to make payment to the plaintiff in accordance with the PN.

[8] Arising from the first defendant's default, on 22 November 2018, the plaintiff lodged its claim with the second defendant under the AIL Policy to recover the losses it incurred arising from the first defendant's default in the sum of INR572,457,085 ("insurance claim"). The second defendant did not pay the plaintiff.

[9] The second defendant and the plaintiff executed an Amicable Settlement Agreement dated 22 March 2019 ("settlement agreement"). The second defendant entered into the settlement agreement in its purported capacity as the authorised representative of the first defendant. In accordance with the settlement agreement, the first defendant was to pay the plaintiff INR6,250,000 on or before 31 March 2019, and INR618,750,000 on or before 31 May 2019.

[10] Pursuant to the settlement agreement, on 2 April 2019, the first defendant paid the sum of INR6,250,000 to the plaintiff. The balance sum of INR618,750,000 was not paid.

[11] Hence, the plaintiff filed this action to claim the following:

(i) from the first defendant and the second defendant jointly and severally, the balance settlement sum of INR618,750,000; and

(ii) alternatively, as against the second defendant, the sum of INR572,457,085 being the plaintiff's insurance claim under the AIL Policy.

[12] Trial of the present action commenced on 12 July 2022, and was continued on 13 July 2022, 3 October 2022 and 4 October 2022, by which time PW1 had finished giving evidence, and PW2 was in the midst of giving evidence and was to continue her evidence on the next trial dates of 12 October 2022, 13 October 2022 and 17 October 2022.

[13] On 11 October 2022, encl. 139 was filed by the first defendant. On the same day, the second defendant's solicitors wrote *vide* encl. 137 to adjourn the trial fixed for 12 October 2022, 13 October 2022 and 17 October 2022 as learned counsel Mr Trevor De Silva was unwell and had a voice problem. The plaintiff's solicitors responded *vide* encl. 138 to the said letter within 90 minutes to agree to the adjournment. Having done so, it is fascinating for the plaintiff to in para. 19 of its submission in encl. 154 in opposing the amendment applications, postulate that these trial dates were vacated due to the amendment applications. It is also incorrect for the plaintiff to assert in the same para. 19 that "further, the court has also proceeded to fix the hearing of D1's amendment application and D2's amendment application (which was yet to be filed at that time) on 9 December 2022." The contemporaneous court minutes of 12 October 2022 is self-explanatory and reads:

A Encl. 1 – Trial dates vacated 12, 13 & 17 Oct for reasons in enc. 137 & 138

– Additional trial dates 10-14 April 2023 (11.4 trial start at 2pm due to P's counsel being engaged in a CA matter))

enc. 139 – P to file AIR within the next 14 days, D1 to respond within
B 14 days;

submissions by 23.11.22, reply submissions if any by 30.11.22 "H" of encl. 139 on 9.12.22@8:30 am;

same day CM for encl. 1 to see if earlier trial dates can be given.

C **Plaintiff's Objections To Encls. 139 And 141**

[14] The following grounds were raised to oppose the applications:

(i) there is inordinate and unexplained delay in filing both amendment applications:

D (a) the applications were filed midway through the trial; see (i) *Christopher Bandi v. Tumbung Nakis & Anor; Jamil Sindi (Third Party)* [2016] 4 CLJ 831; [2016] 4 MLJ 100 CA where the Court of Appeal dismissed the plaintiff's appeal after being unsuccessful in its application to amend midway during trial both in the trial court and
E High Court; (ii) *Ketteman & Ors v. Hansel Properties Ltd & Ors* [1987] 1 AC 189;

(b) there had been close to ten case managements over the course of about three years, but there was no indication that the defendants had contemplated making an amendment application. In *Hong Leong*
F *Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1; [2016] 1 MLJ 301, the Federal Court added delay to the three basic tests in *Yamaha Motor*, overruled the decision of Court of Appeal which granted the defendant/respondent leave to amend and decided that:

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> [27] In our instant case, there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these new
H issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable.

(c) no cogent reasons were given for the delay; the defendants' alleged difficulties and/or hardship in obtaining the relevant information/ documents in relation to the Central Investigations Bureau, New
I Delhi ("CBI") investigation are not justified the defendants would have known of the CBI investigation before, or at the very least by

the time the defendants filed their respective defences in early February 2020. If the first information report ("FIR") was made available in July 2022, the defendants have sat on the matter and should have filed their amendment application to include the particulars of the alleged fraud contained in the FIR at the earliest opportunity or at the very least before the trial commenced on 12 July 2022, especially since:

(1) the allegation of fraud is grave: see *Jupiter Securities Sdn Bhd v. Wan Yaakub Abd Rahman* [2002] 3 MLJ 264;

(2) the defendants have stipulated in their respective original defence that they reserve their right to make amendments to the defence after obtaining further details, information and/or the outcome of the CBI investigation but did not before the trial started;

(3) the plaintiff had constantly objected to these particulars (which the defendants now seek to be added to their pleadings) posed to PW1 on the basis that para. 11 of D1's defence and para. 21 of the D2's defence lacks particulars and specifics of fraud.

(ii) the amendment applications are not *bona fide*, tactical manoeuvres, and afterthoughts to improve on the defence. The timing of the applications to amend, raised the issue of lack of *bona fide* and therefore a tactical manoeuvre. After having the benefit of the plaintiff's objections to the second defendant's counsel's line of questioning, the defendants are attempting to improve their respective defence which lacks particulars of fraud which are expressly required to be pleaded – O.18 r. 12(1) of the ROC 2012; *Zung Zang Wood Products Sdn Bhd & Ors v. Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 CLJ 445; [2014] 2 MLJ 799;

(iii) the character of the suit will be changed:

(a) the amendments premised on the FIR seek to introduce particulars of the alleged irregularities in the processing, sanction, disbursement and monitoring of the loan to GTPL, which are alleged to be instances of fraud;

(b) the proposed particulars are irrelevant and has no bearing on the plaintiff's claim when the same does not even show how fraud has been perpetrated against the defendants;

(c) the FIR and the allegations therein which the defendants have placed heavy reliance on for the amendments is at best a statement lodged by the public (J.N. Chopra) with the relevant authority (here CBI), containing unverified facts/information;

A (d) allowing the amendments would have caught the plaintiff by surprise and has the effect of turning the D1's defence and D2's defence from one character into another and inconsistent character given that the present suit will from a straightforward recovery action become a potential fraud case; nullify the cause papers, among others, the "statement of agreed facts" and "statement of issues to be tried" as ineffectual or useless as nowhere is it featured that fraud has been committed by the plaintiff against the defendants. Allowing the amendments will delay proceedings as a new set of cause papers including bundle of pleadings, bundle of documents, statement of agreed facts, statement of issues to be tried, witness statement, *etc*, would have to be re-filed, due to the change of the nature and character of the suit.

Court's Findings And Decision On Encls. 139 And 141

[15] Having set out the background and the objections to the amendments, I now deal with the issues which arise. I propose, in dealing with these issues, to focus on the main points, and not necessarily to address every point and deal with every authority which was brought up, to avoid a lengthy judgment.

[16] It is axiomatic that the function of pleadings is to define the issues between the parties, so that both the plaintiff and the defendant know what is the other side's case is about, and is able to focus upon the real nature of the dispute.

[17] Whether or not to allow an amendment to a pleading under O. 20 of the ROC 2012 is eminently within the discretion of the trial judge considering the circumstances of the case, such discretion must be exercised judiciously – *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213. The Federal Court said:

> **The general principle is that the court will allow such amendments as will cause no injustice to the other parties.** Three basic questions should be considered in order to determine whether injustice would or would not result. (1) whether the application **is *bona fide*; (2)** whether the **prejudice caused to the other side can be compensated by costs** and **(3)** whether the amendments **would not in effect turn the suit from one character into a suit of another and inconsistent character.** (See *Mallal's Supreme Court Practice* page 342), If the answers are in the affirmative, an application for **amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action** in respect of which relief has already been claimed in the original statement of claim. (emphasis added)

[18] Lord Brandon in *Ketteman & Ors v. Hansel Properties Ltd & Ors* [1987] AC 189 at p. 212 said: A

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O. 20 r. 5, in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be B summarized in the following four propositions. *First,* all such amendments should be made as are necessary *to enable the real questions in controversy between the parties to be decided. Secondly,* amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: *it is not the function* C *of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly,* there is no injustice to the other party if he can be compensated by D appropriate orders as to costs. (emphasis added)

[19] The Court of Appeal in *Skrine & Co v. Mbf Capital Bhd & Anor And Other Appeals* [1998] 3 CLJ 432; [1998] 3 MLJ 649 at p. 672 adopted the expanded principles in *Ketteman*.

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[20] As made clear by *Yamaha Motor*, when considering an application for amendment, three basic questions must be considered:

(i) whether the application was *bona fide*?;

(ii) whether the prejudice caused to the other side can be compensated by costs?; and F

(iii) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character?

[21] By the use of the word "and", if the applicant fails on the first ground, he fails altogether and the amendment application must be dismissed. In this G case, for reasons hereafter, this court's answers to all three questions are in the affirmative.

Whether Defendants' Amendment Applications Are Made Bona Fide

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[22] In this case, whilst it is true that the amendment applications were made midway at trial when the plaintiff's second witness was testifying, the defendants had explained that there were efforts to obtain the documents relating to the criminal investigations by the CBI and that the FIR was only obtained in the first week of July 2022 and filed in court on 11 July 2022. I The second defendants' supporting affidavit (adopted by the first defendant) further states:

A (i) when the FIR marked as IDD1 was referred to PW1 (Sapna Jain) during cross-examination, she had, in her evidence, answered and confirmed several important allegations (stated in FIR) pertaining to the plaintiff's non- compliance with material pre-disbursement conditions, and terms, of the short-term loan agreement between the plaintiff and the borrower B GTPL;

(ii) PW1's confirmation(s) and answers are indicative not just of the admitted existence of such CBI Criminal investigations against the plaintiff, but also of the accuracy and/or (probable) veracity of some of the allegation(s) made in the FIR against the plaintiff, its senior officers C and/or employees, in particular, the (then) plaintiff's head of legal Mr V.S. Rao (notes of proceedings in exh. "YAT3", AIS-D1);

(iii) following the plaintiff's counsel's objection(s) to the cross-examination of PW1 (and also PW2) on such matters, reference was made to para. 11 of D1's defence and para. 21 of D2's defence, when this D Honourable Court had made a direction that such objections are to be taken up in final submissions after completion of evidence at trial;

(iv) thereafter, the trial proceeded with PW1 being further cross-examined, and was thereafter adjourned to 3 October 2022;

E (v) on 3 October 2022, the first defendant filed its additional bundle of documents (encl. 136) containing an Indian Court certified copy of the FIR together with related documents showing the application, and order made, for the same, pursuant to first defendant's engagement of Indian counsel in India, to make such application in August 2022;

F (vi) on 4 October 2022, when PW2 Santhi Chilumuli was cross-examined on such matters (essentially the allegation of bribery/fraud/wrongdoing against the plaintiff and its senior officers), the plaintiff's counsel again raised objections, one of which was now that the earlier-stated paragraphs in the defendants' defences did not allude to particulars of the G alleged bribery, fraud and/or wrongdoing against the plaintiff, despite the fact that this Honourable Court had already made the direction that such objections are to be taken up in final submissions after completion of evidence at trial;

(vii) as such, so as not to have to deal with such recurring objections, second H defendant's counsel informed the court that an application to amend the defendants' defences would be made to include the said particulars.

[23] I find that the defendants have been 'truthful and candid in providing an explanation for the need to amend their pleadings' 'See *E & O Trading Sdn Bhd v. Americk Singh Sidhu & Ors And Another Appeal* [2018] 7 CLJ 685; I [2018] 6 MLJ 783 CA (per Idrus Harun JCA)' at [29] and in accepting the defendants' reasons for the delay, I have given due consideration to the following:

(i) O. 20 r. 5 and r. 8 of the ROC 2012 which provide that an amendment may be allowed at any stage of the proceedings; the words 'at any stage of the proceedings' in the rules are not superfluous words used by the legislators;

(ii) the Court of Appeal case of *Suhaili Ismail v. Syarikat Sribima Sdn Bhd* [2015] 1 LNS 719; [2015] 6 MLJ 556 which cited with approval Abdul Malik Ishak J's (as he then was) decision in *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825; [2004] MLJU 529. His Lordship said:

> It must not be forgotten that amendments to pleadings may be sought and granted "at any stage of the proceedings". Indeed, reported authorities are abound in the law journals which categorically show that *amendments to pleadings are allowed before trial, during trial, before judgment, after judgment and even when there is a pending appeal against a judgment in a situation where the said judgment has been granted premised on the original un-amended pleadings.* I must be forgiven if I were to cite these authorities not in its chronological order:
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> (a) *Malayan Banking Ltd. v. Ting Ee Ngieng & Anor.* [1965] 2 MLJ 160, where McGilligan J. granted the amendments to the plaintiff's statement of claim on the first day of the trial – before the trial started;
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> (b) *Mahan Singh v. Government of Malaysi*a [1973] 2 MLJ 149, where Sharma J granted amendments to the plaintiff's statement of claim on the third day of the trial;
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> (c) *Lim Koon Ee v. Mohd. Saad* [1962] 28 MLJ 242, where Suffian J granted amendments to the defendant's defence after hearing and before delivery of judgment;
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> (d) *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 MLJ 629, where the Court of Appeal accepted a passage from "*The Supreme Court Practice* (1995) volume 1, part 1" which *stated that amendments may be allowed before, or at, or after the trial, or even before judgment or on appeal.* Incidentally, the judgment of the Court of Appeal was written by Abdul Malek Ahmad JCA (now President of the Court of Appeal);
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> (e) *Amanah Merchant Bank Bhd. v. Lim Tow Seng & 3 Ors.* [1992] 1 CLJ 647, where Siti Norma Yaakob J. (now FCJ) granted an oral application to amend the plaintiff's statement of claim during the hearing of the appeal to the Judge in Chambers against the decision of the SAR which had granted summary judgment; and

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(f) *Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.* (1988) 2 CLJ 473, where Dr. Zakaria Yatim J allowed an application to amend the plaintiff's statement of claim which was filed after the Order 14 application was dismissed by the SAR and where an appeal to the Judge in Chambers against the said dismissal was still pending and had not been heard yet. (emphasis added)

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(iii) *Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor* [2003] 2 CLJ 585; [2003] 1 MLJ 409 where Low Hop Bing J (as he then was) allowed the application by the second defendant for leave to amend her defence and to delete her counterclaim against the plaintiff four years after the commencement of the trial;

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(iv) *Chaw Anui v. Tan Kim Chai* [2002] 5 CLJ 79; [2001] MLJU 531, where Low Hop Bing J (as he then was) allowed an amendment to the divorce petition in the midst of trial, held:

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The proposed amendment as alluded to above, consists of allegations of facts which have to be established by way by proper *viva voce* evidence. Although it is true that the petitioner has given her evidence, the law allows the petitioner to be recalled for examination in chief, cross-examination and re-examination pertaining to the proposed amendment. Parties are still at liberty to

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apply to the court for other witnesses to be called or recalled to adduce relevant and admissible evidence: s. 138(4) Evidence Act 1950.

(v) *Ban Seng Leong Sdn Bhd & Ors v. Kong Kon Fah & Ors* [1999] 2 CLJ 170, the defendant's proposed amendments arose as a result of facts arising

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during cross-examination of the plaintiff's first witness. Clement Skinner JC (as he then was) in endorsing the subordinate's decision to allow the amendment application, held:

[3] The amendment allowed did not change the nature and character of the defence. This is because the respondents were not seeking to

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substitute their defences with one of fraud. *Fraud constituted an additional defence. The amendment was sought to put all matters in controversy between the parties into issue so that the court could adjudicate on them.* The justice of this case required that the respondents be permitted to raise the allegation of fraud now as they were faced with the prospect of having to pay monies for a flat which they might never

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own because of the fraud of the appellants.

[4] If *parties are allowed to amend* their defence in the manner the respondents did, that is, *during the course of a trial as a result of certain evidence coming to light,* there is no danger that there will be no end to parties seeking to amend continually throughout a trial because

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any attempt to amend during a trial will require leave and the court will always be vigilant to ensure that any request to amend does not constitute an abuse of process.

(vi) *Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor And Another Appeal* [2011] 5 CLJ 720; [2009] 4 MLJ 833 where the Court of Appeal in allowing the respondent's amendment appeal to include a counterclaim after the summary judgment has been finalised and held at [20] that "while the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay *per se* does not equal prejudice or injustice." The Court of Appeal had referred to *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121; [2004] 4 MLJ 398 decided by the same court. In *HSBC Bank*, the Court of Appeal had also held that delay *per se* does not equal to prejudice:

> [15] … delay alone is not a ground to refuse an application for leave to amend …

(vii) *ESP Energy Sdn Bhd v. KB Enviro Sdn Bhd* [2017] 1 LNS 2073; [2018] 8 MLJ 516, where the court allowed the plaintiff's amendment application, which was only made after the commencement of the trial. The court held as follows:

> [33] ... I agree the *tardiness of the plaintiff* in moving this application *is far from laudatory.* But this *does not, without more, amount to bad faith.* (emphasis added)

(viii) in *Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors* [2010] 7 CLJ 931; [2009] 3 MLJ 785, the Court of Appeal held that eight to nine months delay in making the application did not constitute an inordinate delay to reflect any lack of *bona fide* on the appellant's part and further said:

> [23] … it is a well settled principle that an amendment ought in general be allowed even if comes late … (emphasis added)

(ix) *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2010] 8 CLJ 1 CA, one of the reasons given by the High Court in disallowing the plaintiff's amendments was because the proposed amendments was a tactical manoeuvre and an abuse of process of the court as it would have the effect of nullifying mutual concessions and admissions that the parties had made in the "statement of agreed facts" and "agreed issues to be tried". The Court of Appeal allowed the appeal by the plaintiff to amend. Hasan Lah JCA in delivering the judgment of the court said:

> [43] *It is our view that the proposed amendments should be allowed so that the true issues in controversy between the parties could be resolved. The courts exist for the administration of justice and to decide the rights of the parties* and since the plaintiff felt that his original statement of claim would not lead to a decision of the real matter in controversy and the law allows the amendment to be made to the pleadings the plaintiff should be allowed to have it corrected if it can be made without any injustice to the defendant.

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> [46] We are of the view that in considering whether any injustice would be caused the position of the plaintiff must be balanced with the interest of the defendant. *Injustice caused would be far greater if the plaintiff's case is to be limited prematurely.* He would be *shut out from his claim* of true innuendo based on the further plea of extrinsic facts. On the other hand, the defendants would still have their day in court if the proposed amendments are allowed. The trial proper has not begun. The defendants would still be able to apply to have the preliminary points of law determined by the court since the proposed amendments are based on the same facts. We had no doubt that the plaintiff's application was *bona fide*. As such whatever prejudice suffered by the defendants, under the circumstances, could be compensated with costs. (emphasis added)

[24] It cannot be doubted for a moment therefore from the authorities discussed, that leave to amend may be granted at any stage of the proceedings and even if the effect of the amendment would be to add or substitute a new cause of action so long as there is no injustice and/or prejudice caused to the other party that cannot be compensated with costs.

[25] As the plaintiff has brought up the *Hong Leong Finance* case (*supra*), I would respectfully state that the principles therein may have been much misunderstood. The *Hong Leong Finance* case in my view ought to be considered carefully based on its facts, and its application here can be distinguished. In that case, four days before trial, an application was made to amend the defence and introduced two new and distinct defences. There was a span of 13 years between the close of pleadings and the application to amend. In *Hong Leong Finance*, despite 13 years after the close of pleadings, trial had not commenced. As such, further delay could not be brooked.

[26] The pronouncement in *Hong Leong Finance* on delay could not therefore with utmost respect, extend to all 'delay' as each case must be decided on its own facts. Unlike the *Hong Leong Finance*, the case here when trial started, was 2.5 years old as the parties had litigated to the Court of Appeal and Federal Court on the question of stay pending arbitration and in the instant case, no new and distinct defence was introduced. The complaint of the criminal investigation on allegations of bribery, fraudulent conduct and/or wrongdoing of the plaintiff (and its senior officers) was already pleaded in the respective defence of the first and second defendants which I will come to in a while. I find the instant applications to amend are not too late. In appropriate circumstances, there is (even) power to amend between judgment and the drawing up of the order – *Charlesworth v. Relay Roads Ltd* [2000] 1 WLR 230.

Whether The Amendment Applications Are Tactical Manoeuvres, And Afterthoughts To Improve On The Defence

[27] The plaintiff alleged that each of the amendment applications is "afterthought" and/or a "tactical manoeuvre" to improve the defence and delay the trial.

[28] I would begin by referring to *Bumiputra-Commerce* (*supra*) where His Lordship Abdul Malik Ishak J (as he then was) said succinctly:

> It is a **truism to say that every amendment of pleadings is to improve a litigant's chance of winning.** There is **nothing wrong in that. It is the right of every litigant** to manoeuvre his way, upon legal advice, according to the RHC. The defendant here was doing just that. In my judgment, **the defendant should not be denied leave** to amend its defence in order **to make good the defects** in the pleadings so that the **real issues between the parties would be tried and determined** (*Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor* (*supra*)) (emphasis added)

[29] It is to be noted that:

(i) the applications in encls. 139 and 141 sought to insert particulars of fraud to the D1 and D2's defence at paras. 11 and 21 respectively. The amendments in my view serve to give more particulars on allegations of wrongdoings/bribery/fraud and both defendants had in their respective original defence reserved their right to make amendments to the defence after obtaining further details, information and/or the outcome of the CBI investigation;

(ii) the second defendant had already pleaded the criminal investigation and further, fraud at paras. 18, 19, 20, 21 and 22 where amendments are now sought to amplify para. 21 of its defence which in its original form reads:

> Additionally, the 2nd Defendant has since discovered in or about April 2019, that the Central Investigations Bureau, New Delhi (CBI), commenced *a criminal investigation (which may still be ongoing) pertaining to allegation(s) of bribery and/or fraudulent conduct, in relation to the PN and/or IFCI loan given to GTPL, involving, inter alia, certain officials of the Plaintiff, Calfin and GTPL.* The 2nd Defendant contends, and will contend, that *if proven*, such allegation(s) of *bribery and/or fraud will also cause the AIL Policy to be void.* In this regard, the 2nd Defendant is currently in the process of obtaining further details, information and/or documents with regards this criminal investigation and hereby reserves its right to make such amendment(s) to its Defense, as may be required, in due course. (emphasis added)

(iii) the first defendant also had already pleaded fraud at paras. 11, 12.4 and 12.5 of its defence where particulars are sought to be added to para. 11 which in its original form reads as follows:

A Further, the 1st Defendant will contend that such details, particulars and/or proof of default by GTPL, and/or the actual loss (if any) by the Plaintiff, becomes all the more imperative in view of certain criminal investigations done by the Central Investigations Bureau, New Delhi, pertaining to allegation(s) of bribery and/or wrongdoing(s) involving high-ranking officers of the Plaintiff, Calfin and GTPL. The
B 1st Defendant hereby reserves all rights to make such amendment(s) to its defense after obtaining further details, information and/or outcome of this investigation.

(iv) the proposed amendments aim to put forward further and better particulars of and related facts that arose from the criminal investigation,
C the complaint of bribery fraud/wrong doing and give such complaints greater clarity and/or enable the real questions and/or true issues in controversy between the parties to be resolved and/or decided (See *Dato' Tan Heng Chew* (*supra*)), *Skrine & Co* (*supra*);

D (v) the proposed amendments will facilitate the adjudication of the issues between the plaintiff and the defendants fairly and equitably. In *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126; [1987] 1 MLJ 230, Abdul Hamid, Ag LP, observed that all such amendments ought to be made for the purpose of determining the real questions in controversy between the parties to any proceedings as the
E object of the court is to decide on the rights of the parties; and

(vi) the plaintiff at all material times has knowledge and is aware of the defendants' existing complaints of the criminal investigations, fraud/bribery/wrongdoing set out in the defence.

F **[30]** Thus, I find that the plaintiff's objections of tactical manoeuvre, afterthought or even surprise have no teeth. Further as between the plaintiff and the first defendant, it is imperative to note that one of the agreed issues to be tried is "whether the amicable settlement agreement is valid and binding on the first defendant in view of the first defendant's allegation(s) of
G bribery and/or wrongdoing(s) allegedly involving the plaintiff, Calfin and GTPL?" The second defendant as the agent, mediator and/or representative of the first defendant, as submitted by its learned counsel, has sufficient nexus to that issue besides having already on its own pleaded fraud as alluded earlier.

H *No Change In Character Of The Suit*

[31] The plaintiff posited that the amendments have the effect of turning the first defendant and second defendant's respective defence from one character into another and inconsistent character given that the present suit will from a straightforward recovery action become a potential fraud case. I do not
I agree.

[32] As pointed out earlier, the criminal investigation on allegations of bribery, fraudulent conduct and/or wrongdoing of the plaintiff (and its senior officers) was already pleaded. I accept that the proposed amendments are in amplification and clarification of the criminal investigation on allegations of bribery, fraudulent conduct and/or wrongdoing of the plaintiff (and its senior officers), by providing further and better particulars. The proposed amendments arose from the same factual matrix and/or facts which have already been pleaded in the original defence and merely seeks to expand on the defendants' original defence.

[33] In *Yamaha Motor*, the appellants, by an amended statement of claim, sued the four respondents for an order that the debenture issued by the first respondent is null and void for lack of consideration. The pivot of the respondent's defence is, *inter alia*, that the appellant had no reasonable cause of action as they were not party to either the debenture or charge. The appellants subsequently applied for leave to amend the amended statement of claim to include the allegation of fraud and conspiracy against the respondents. The Federal Court granted leave to amend, and held as follows:

> … the amendment *does not in reality introduce any new cause of action.* The amendment merely shows more clearly why the debenture is null and void … *In alleging fraud or conspiracy in the proposed amendment,* we are of the view that having regard to the original Amended Statement of Claim, *the Appellants have not in effect, turned the original claim* which is for an order to declare the 1977 debenture null and void for lack of consideration, *into a claim of another and inconsistent character* ... By the proposed amendment, the appellants merely allege that as there was no money due between the two parties, the debenture was created as a result of conspiracy and fraud by the first and second respondents and others. *The alleged conspiracy and fraud is, to our mind, a mere extension of the allegation that the debenture is null and void for lack of consideration.* Indeed, on the facts of the present case, *even if the allegation can be held to constitute a new cause of action, the amendment is allowable under Order 20 Rule 5(5) as it arises out of the same facts as the original cause of action* in which the relief has already been claimed by the appellants in the original pleading. (emphasis added)

[34] Applying *Yamaha Motor*, I find that the amendments are consistent with and show more clearly the defendants' pleaded criminal investigation and complaint of fraud and wrongdoing. The plaintiff is not confronted with a new case to answer if the amendments are allowed. Whether the defence after amendment will succeed, is all together another matter to be determined at trial. I thus do not see how the character of the suit has been changed.

[35] Added to that, it is firmly established law that even if the applications seek to raise a new cause of action or line of defence, the amendments ought to be allowed if it arises out of the same facts and/or same transaction as expressly provided by O. 20 r. 5(5) of the ROC 2012:

> An amendment **may be allowed** under paragraph (2) **notwithstanding that the effect of the amendment will be to add or substitute a new cause of action** if the new cause of action **arises out of the same facts or substantially the same facts** as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. (emphasis added)

[36] The application of the above rule is illustrated for *eg*, in *Yamaha Motor*. In *Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors* [2010] 7 CLJ 931; [2009] 3 MLJ 785 CA, the Court of Appeal held that even if the amendments are substantial, it just merely seeks to supplement what has been earlier pleaded.

> [21] … even if the proposed amendment give rise to a new cause of action, but it does not turn the suit from one character to another ... In our view, even though the proposed amendments appear to be massive but in reality, it merely seeks to supplement what has been earlier pleaded in the said paragraphs …

[37] In *Suhaili Ismail* (*supra*) the Court of Appeal held that:

> [6] … it is clear that the learned judge accepted the respondent's explanation that the allegation of conspiracy arose from the same facts or were substantially the same as those already pleaded by them and that the proposed amendments were necessary to be placed before the court so that all questions of controversy can be finally determined by the court. We have no reason to disagree with the learned judge.

[38] In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361; [1997] 1 MLJ 629, the Court of Appeal also held that:

> … The authorities strongly indicate that the court should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction … .

[39] In the circumstances of this case, premised on the authorities discussed, this ground of objection does not resonate with this court. I do not find that the character of the defences has changed such that the plaintiff "is now compelled to meet a case radically different from the one it was first called upon to meet."

Prejudice If Any Can Be Compensated By Costs

[40] The burden lies on the plaintiff to establish that it would suffer prejudice as a result of the amendment – *Ribuwajar Development Sdn Bhd v. Ratus Mayang Sdn Bhd* [2002] 6 CLJ 56; [2001] MLJU 693.

[41] Second defendant's counsel drew attention of this court to the Court of Appeal case of *China Orient Asset Management Corporation v. Alexma Corporation Sdn Bhd* [2017] 1 LNS 1558 which explained the meaning of "prejudice" (in the context of amendment applications) as follows):

> [14] In this connection, we hasten to observe that although it is quite usual for parties in amendment applications to shout "prejudice", there is a common misappreciation of what "prejudice" means (see *ASM Development Sdn Bhd v. Hijjas Kasturi Associates Sdn Bhd* [2009] 3 CLJ 1; [2011] 6 MLJ 228). *"Prejudice", in the context of amendment applications, cannot mean that if the amendment is allowed, the chances of success of the litigation of the affected party will be severely diminished. "Prejudice" simply means that if the amendment is allowed, the party affected will be unable to pursue or defend the suit, for example, where the material evidence necessary to pursue or defend the suit, and which is necessitated by the amendment, is lost or no longer available. In such a case, the prejudice is clearly seen. In every other case, where no such prejudice arises, the party can be compensated with costs.* (emphasis added)

[42] Bearing in mind that the amendments do not introduce anything inconsistent with the original pleading but only provide particulars of allegation(s) of criminal investigations and wrongdoing in relation to the GTPL loan which have already been pleaded, and the trial in the present case is still at the stage of the plaintiff's case, with the plaintiff's second witness, (in like situation as in *Ban Seng Leong, Lee Ah Lan, Chaw Anui*) there is no real prejudice to the plaintiff if the amendments are allowed. In my respectful view, if deemed fit, the plaintiff can still call witnesses and tender other documents to rebut the allegations particularised in the proposed amendments whereas injustice caused would be far greater to the defendants by not allowing the amendments. The defendants would be "shut out from the opportunity of receiving justice" even if the plaintiff asserts such amendments are irrelevant and does not show how fraud was perpetuated.

[43] In *Yamaha Motor*, the respondents objected to the proposed amendment claiming that it does not disclose a reasonable cause of action, even if it is allowed and/or that the appellant's claim is bound to fail. The Federal Court held that as follows:

> … Mr. C.F. Leow, counsel for third and fourth respondents, argues that if the appellants failed as judgment creditors they would also fail as shareholders. That, we think is prejudging the issue. *At this stage of the proceedings the court is not concerned with the merit of the appellants' case.* Even after amendment, the respondents have the right to take necessary steps to strike out the whole claim if the Statement of Claim, as amended, does not disclose any cause of action or is found to be frivolous and vexatious and an abuse of process of the court.
>
> … they say the proposed amendment does not disclose a reasonable cause of action, even if it could be allowed … Mr. Lim Chor Pee, counsel for the second respondent, whose submission is adopted by counsel for the first respondent, has meticulously shown to us from the facts of the case why the appellants' claim would fail with or without the amendment. *That may or may not be so, but in the final analysis it is for the trial court eventually to decide the merit of appellants' claim after hearing all the evidence and arguments.* (emphasis added)

[44] Similarly, in *Alloy Consolidated* (*supra*), the Court of Appeal held:

> [21] We are not convinced that the application in encl. 38 was made *mala fide*. In the present appeal we are satisfied that by allowing the first respondent's application in encl. 38, the appellant will suffer no prejudice or harm that cannot be compensated by a suitable order as to costs. On the other hand, we have to consider the position of the first respondent. Its counterclaim may or may not succeed. **In this proceeding we are not concerned with the merit of the first respondent's case.** However, **if the amendment is not allowed, the first respondent will forever be shut out from its opportunity at receiving justice.** On balance, we feel that the amendment should be allowed. We therefore hold that the learned judge of the High Court did not err in making the order which had the effect of allowing encl. 38. (emphasis added)

[45] In making allowance for doing overall justice, this court do not see how the plaintiff is prejudiced by the amendments such that it cannot be compensated in costs. I refer to Lord Justice Bowen LJ's observation made 140 years ago in *Cropper v. Smith* (1884) 26 Ch D 700 at pp. 710 to 722:

> it is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended or overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do **not** regard such amendment as **a matter of favour or grace** ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a **decision of the real matter in controversy,** it is as much a **matter of right on his part to have it corrected if it can be done without injustice,** as anything else in the case is a matter of right. (emphasis added)

[46] In the exercise of discretion conferred upon this court, with regard had to the factual matrix and circumstances of this case and the established legal principles that are attendant upon applications of this nature, and for all the above reasons, I am inclined to the view, that the balance of justice lies in allowing both the defendants' applications. As such, I exercise my discretion to allow encl. 139 and encl. 141 with costs, subject to allocator to be paid to the plaintiff.